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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of:

Implementation of the Satellite Home
Viewer Improvement Act of 1999

Retransmission Consent Issues

CS Docket No. 99-363

COMMENTS OF FOX TELEVISION STATIONS, INC.

Fox Television Stations, Inc. ("Fox"), by its attorneys, files these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. In these Comments, Fox will briefly address the provision in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") that requires the Commission to adopt regulations that "prohibit a television broadcast station that provides retransmission consent from... failing to negotiate in good faith."

Fox urges the Commission to refrain from adopting regulations that will place undue constraints on normal, arms length negotiations between broadcasters and multichannel video programming distributors ("MVPDs"). Instead, the standards and rules adopted to implement the statutory provision should allow the marketplace to function freely, and should provide the parties with the flexibility they need to respond to changing marketplace and competitive conditions.

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There is no evidence of a marketplace failure that requires heavy-handed government intervention in retransmission consent negotiations. In fact, the evidence supports the conclusion that only minimal regulatory oversight is appropriate. Fox has only recently concluded new retransmission consent agreements covering the analog and, in many instances, the digital signals of its 22 owned and operated stations with such major cable operators as AT&T BIS, Time Warner Cable and Charter Communications. Significantly, even before adoption of SHVIA, Fox had also executed retransmission consent agreements for its owned and operated stations with the two major DBS satellite operators – DirecTV and EchoStar.

A list of specific *per se* behavioral prohibitions cannot adequately account for the factual context of a particular negotiation. Therefore, Fox opposes the Commission’s proposal to create such a list (NPRM ¶18). However, if the Commission adopts the kind of two-prong test it proposes in the NPRM, the specific actions that would constitute “bad faith” should be narrowly drawn to encompass only the most obvious and egregious breaches of good faith negotiating practices, and the Commission should always examine the factual context in which each alleged prohibition occurred. Moreover, as the Commission notes, the actions or practices identified must be directly relevant to the retransmission consent context and to the various marketplace and competitive factors that apply to retransmission consent negotiations.

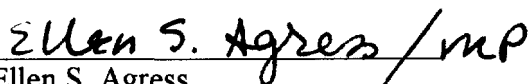
Conversely, the Commission should craft a general and expansive definition of the “competitive marketplace considerations” that justify different retransmission consent terms and conditions for different distributors (NPRM ¶19). Marketplace considerations must account not only for each party’s business needs and goals, but also for such

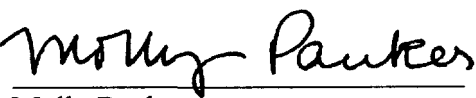
“macro” marketplace trends as the economy, technology and competition. The Commission should not – because it cannot with accuracy – enumerate all the business and marketplace considerations that would be appropriately relevant to a party’s bargaining position in a retransmission consent negotiation. Rather the parties should have the ability to take all business and marketplace factors into account during the give and take of their discussions. Otherwise both sides will be unfairly deprived of the flexibility necessary to respond to rapidly changing marketplace conditions.

The rules adopted by the Commission in this proceeding should be applied only prospectively to retransmission consent negotiations that occur after the rules’ effective date. Finally, Fox submits that the rules adopted to implement the “good faith negotiation” requirement of SHVIA, should apply equally to both broadcasters and MVPDs. Nothing would be more unfair than a regulatory scheme that required broadcasters to proceed in good faith but did not place a corresponding obligation on the other party to a retransmission consent negotiation.

Respectfully submitted,

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